SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

October Term, 1968.

No. 481.

DONALD T. LAPINSOHN and
CAROL LAPINSOHN, his wife,
Respondents,

v.

~~LEWIS CHARLES, INC.~~

~~and~~

FIRST CAMDEN NATIONAL BANK & TRUST CO.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

DONALD T. LAPINSOHN AND
CAROL LAPINSOHN, HIS WIFE,
Respondents

v.

~~LEWIS CHARLES, INC.~~
~~and~~
FIRST CAMDEN NATIONAL BANK & TRUST CO.,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, First Camden National Bank and Trust Co., respectfully prays that a Writ of Certiorari issue to review the Order of the Superior Court of Pennsylvania which was entered on March 21, 1968.

OPINIONS BELOW.

The opinion of the Superior Court of Pennsylvania is reported at 212 Pa. Super. 185, 240 A. 2d 90 (1968); a copy of the said opinion is attached hereto as Appendix A. The opinion of the Court of Common Pleas of Philadelphia County is unreported; a copy is attached hereto as Appendix B.

JURISDICTION.

The Order of the Superior Court of Pennsylvania was entered on March 21, 1968. Petitioner's request for reargument, addressed to the Superior Court, was denied April 16, 1968. Petitioner thereafter petitioned the Supreme Court of Pennsylvania for allowance of an appeal from the Superior Court to the Supreme Court, which Petition was denied on June 10, 1968; a copy of the Supreme Court's Order is attached as Appendix C. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3). The Order sought to be reviewed is final since, if the question of venue is postponed until the conclusion of the trial, the parties may be compelled to relitigate in another forum. *Mercantile National Bank v. Langdeau,* 371 U. S. 555 (1963).

QUESTION PRESENTED.

Whether a state "doing business" doctrine shall supplant a federal venue provision so as to permit proceedings against a national bank in a jurisdiction where it is "doing business" but which is not where the bank is "located" as required by the National Bank Act 12 U. S. C. § 94.

STATUTORY PROVISION INVOLVED.

The statutory provision which is involved in this case is 12 U. S. C. § 94 of the National Bank Act, which section is subtitled "Venue of Suits" and reads as follows:

> Actions and proceedings against any association under this chapter may be had in any district or territorial court of the United States held within the district in which each association may be established or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases.

STATEMENT OF THE CASE.

Petitioner is a national banking association organized and existing under the laws of the United States and controlled by the Treasury Department (R. 25a). Under its Articles of Association, Petitioner is established in Camden, New Jersey where it maintains its principal office for conducting its business (R. 26a, 39a).

Petitioner operates a branch office in Pennsylvania at 223-225 Market Street, Philadelphia (R. 27a). The Philadelphia branch has been conducting business at that location through its predecessors as early as 1812, when it was known as the State Bank of Camden (R. 30a). On June 2, 1865, this branch became part of the National State Bank of Camden, Petitioner's immediate predecessor (R. 27a), and on May 16, 1928, Petitioner assumed control and operation of the banking business at that location (R. 27a). Petitioner employs six persons to service its customers and accounts at this branch (R. 43a).

Respondents are New Jersey residents (R. 7a). Lewis Charles, Inc. (Defendant in the lower court and only nominally a party to these proceedings) is a New Jersey corporation engaged in the business of building and selling homes in New Jersey (R. 7a).

On November 25, 1966, Respondents instituted a suit in Pennsylvania against Defendant for allegedly defective construction of a residence in New Jersey (R. 1a, 7a, 14a). The action was commenced by writ of foreign attachment pursuant to Rule 1252(3) [1] of the Pennsylvania Rules of Civil Procedure which provides that suit against a foreign corporation may be maintained in Pennsylvania if a garnishee holding property of the Defendant may be served in the county where the action is commenced.

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1. All Pennsylvania Rules of Civil Procedure pertinent to foreign attachment practice and which are applicable to this proceeding are set forth in Appendix D to this Petition.

On November 25, 1966, the Sheriff of Philadelphia County served Respondents' writ upon Petitioner's Philadelphia branch office by handing a copy of the attachment papers to an officer of Petitioner at the branch (R. 6a).[2]

On December 5, 1966, Petitioner filed preliminary objections to the writ of foreign attachment as is contemplated by Rule 1268 of the Pennsylvania Rules (Appendix D). Petitioner contested the validity of the attachment on the grounds that section 94 of the National Bank Act prohibited it from being a party to a proceeding in Philadelphia when its Articles of Association provided that the bank was located in Camden, New Jersey (R. 1a, 16a).

Rule 1254(a) (Appendix D) directs that the venue for an attachment may be laid either where ". . . (1) the property is located, or (2) a garnishee may be served." (Appendix D). The Sheriff's return on the writ reflected that the attachment was effected by personal service upon one of Petitioner's officers at the Philadelphia branch; no property of the Defendant was located or seized (R. 62). Since no property was found, Petitioner contended that it could not be served here or made a party to an attachment in Philadelphia consistent with section 94 of the Act, and requested the Court to quash Respondents' writ and dissolve the attachment against it (R. 16a, 17a).

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2. The Commonwealth Land Title Insurance Company (herein Commonwealth) was also named as a garnishee in this action and served with a writ of foreign attachment. On December 19, 1966, with the agreement of Respondents, the attachment proceedings were discontinued against Commonwealth (R. 1a). Commonwealth was retained in the caption of this case both by the Court of Common Pleas of Philadelphia County and by the Pennsylvania Superior Court, although it did not participate in the proceedings in either Court, nor does it have an interest in the outcome of this Petition. Counsel for Petitioner is, simultaneous with the filing of this petition, serving upon the Clerk of the Court the notice required by Rule 21(6).

Respondents answered Petitioner's objections contending either that Petitioner had consented to suit in this forum or, by conducting a banking business in Philadelphia, it had waived its right to claim the immunity to suit afforded by the Act (R. 19a). Thereafter, depositions of Petitioner's officers, Messrs. Rivers and Viner were taken on these issues (R. 23a to 61a). The depositions established that Defendant maintained a checking account with Petitioner having a balance of $9500.00 (R. 34a).

On May 29, 1967, the Court of Common Pleas of Philadelphia County by the Honorable Joseph E. Gold sustained Petitioner's preliminary objections and dissolved the writ of foreign attachment (R. 62a).

On June 9, 1967, Respondents appealed to the Superior Court of Pennsylvania. The Superior Court on March 21, 1967, by vote of three to two, filed its opinion and Order reversing Judge Gold's Order and reinstating Respondents' writ against Petitioner. The sole rationale offered by the Court in support of its decision was that Petitioner had waived its rights to be sued in Camden, New Jersey under section 94 by operating a branch office in Philadelphia.

On March 29, 1968, Petitioner filed a timely petition for reargument with the Superior Court which was denied on April 16, 1968. Under 17 *Pa. Stat. Ann.* § 190 (1963),[3] the allowance of an appeal from the Superior Court of Pennsylvania to the Supreme Court is discretionary. On May 6, 1968, Petitioner filed with the Supreme Court of Pennsylvania a Petition for Allowance of Appeal, which was denied on June 10, 1968 (Appendix C). This Petition follows.

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3. Petitioner has included the full text of this statute as Appendix E.

REASONS FOR GRANTING THE WRIT.

I. The Decision of the Pennsylvania Superior Court Conflicts With This Court's Directive in the *Langdeau* Case.

The Pennsylvania Superior Court in deciding that Petitioner is amenable to suit in Philadelphia, where it is doing business, rather than in Camden, New Jersey where it is located,[4] places itself in direct conflict with this Court's ruling in *Mercantile National Bank v. Langdeau*, 371 U. S. 555 (1963), reaffirmed *per curiam* in *Michigan National Bank v. Robertson*, 372 U. S. 591 (1963).

In *Langdeau*, the receiver of a Texas insurance company in liquidation brought an action against numerous defendants, including two national banks. The action was commenced in Travis County, whereas the defendant national banks were located in Dallas County, Texas. The banks pleaded their section 94 privilege and urged that venue could be laid only where they were located. Texas had a statute making venue in Travis County proper. The Supreme Court of Texas held that its statute superseded section 94 of the National Bank Act. In reversing, this Court was explicit in commanding respect from states which would alter the federal legislation:

> National Banks are quasi-public institutions and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress *and are*

4. Courts have repeatedly and uniformly held that a national bank is "located" or "established" within the meaning of the venue statute at the place specified in its organization certificate. Manufacturers National Bank v. Baach, 16 Fed. Cas. 671 (No. 9052) (C. C. S. D. N. Y. 1871); National Union Fire Insurance Co. v. Lippert Bros., Inc., 233 F. Supp. 650 (D. Neb. 1964).

> *not to be interfered with by state legislative or judicial action, except so far as the law making power of the government may permit, Langdeau* at 558-59, quoting from *Van Reed v. Peoples' National Bank,* 198 U. S. 554 (1905). (Emphasis supplied.)

The invulnerability of National Bank legislation to interference by the states was forcefully underscored by this Court last term in *First Agricultural National Bank v. State Tax Commission,* — U. S. — (1968) 36 U. S. Law Week 4686, June 17, 1968.

Nevertheless, the Pennsylvania Superior Court viewed its mission as creating a basis for avoiding, without totally ignoring, the federal venue statute. To do so, however, meant that *Langdeau* had to be ignored. In fact, there is neither a discussion nor even an attempt to distinguish that case in the body of the Court's opinion.[5]

In *Langdeau,* this Court reversed the Supreme Court of Texas for applying its own venue statute as a justification for denying the effectiveness of section 94. Here, the Superior Court preferred its venue provision (Rule 1264(a)(2)) holding that Petitioner could be served in Pennsylvania and therefore made a party to proceedings outside the place of its location. Presumably, to avoid the conflict criticized by this Court in *Langdeau,* the Superior Court saw the operation of a branch bank as manifesting Petitioner's intent to be found in Pennsylvania, upon which the doctrine of waiver could be predicated. Thus, there is no essential difference between the Texas Court's position in *Langdeau,* and Pennsylvania's stance in this case, except for the gloss of "doing business." Peti-

5. The Langdeau case is cited in the Court's opinion for the fundamental proposition that a national bank should not be sued in a district or county other than that in which it was originally chartered. (212 Pa. Super. at 187; 240 A. 2d at 92). The case is not mentioned again.

tioner submits that on this basis alone, the Pennsylvania Superior Court must be reversed in conformity with this Court's instructions in *Langdeau.*

Moreover, the factual basis for the Superior Court's holding that a waiver has occurred is tenuous at best. There has been a branch of a New Jersey national bank in Philadelphia since 1865 (R. 27a). Presumably, Congress was aware of Petitioner's multistate banking operations in 1875 when it passed the predecessor of the present venue statute. Thus, Petitioner cannot have waived a statute passed for its benefit, unless the Court is prepared to say that the waiver of the statute occurred at the instant the act was passed. Furthermore, the Court below holds that since Petitioner availed itself of the federally granted privilege of doing business in Pennsylvania, then it has manifested an intent to be found in Pennsylvania for suits arising out of business conducted here. (212 Pa. Super. at 193, 240 A. 2d at 94-95.) However, there is not one shred of evidence in the record which even remotely suggests the Petitioner's doing business gave rise to or had any connection with the underlying cause of action. Contrariwise, all the indications in the record point to the appropriateness of Camden County, New Jersey as the forum to litigate these claims since all parties reside there and the real estate which is the subject of the suit is situate there (Respondents' Complaint R. 7a to 11a).

As added justification for its decision, the Superior Court attempts to interpret section 94 in light of modern day banking practices which it sees as minimizing the need for a protective venue statute. (In so doing, it relies upon *Chaffee v. Glen Falls National Bank & Trust Co.*, 128 N. Y. S. 2d 539 (1953), disapproved by implication in *Langdeau, supra,* at 529, footnote 13.) Curiously, the Court sees this rendering of the statute as preserving "the

general policies of the National Bank Act" (212 Pa. Super. at 192-193, 240 A. 2d at 94) even though it holds that proceedings against Petitioner may be maintained at its branch bank. The difficulty with the Court's analysis is that it fails to recognize that a special venue statute is clearly intended as a departure from the usual rules permitting suit where a party can be found or, in the case of a corporation, where it is doing business. Therefore, the only policy of the federal statute is to permit suits at the place where the national bank is located, and not elsewhere. Moreover, Mr. Justice White in *Langdeau,* foreclosed this area of inquiry by declaring: "But, without indulging in conjecture as to the object of the exemptions in question, it is sufficient that it was granted by Congress." *Langdeau, supra,* at 559.

The Pennsylvania Superior Court ruling disguises in waiver language what is a judicial repeal of section 94 as it applies to Petitioner's branch in Philadelphia. No Court yet has assumed this power, especially in light of the unequivocal mandate of this Court:

> Unquestionably, Congress has authority to prescribe the manner and circumstances under which [national] banks could sue or be sued in the courts and it addressed itself to this matter in the [venue provision].
>
> Appellee, however, would have us hold that any State Court could entertain a suit against a national bank as long as state jurisdictional and venue requirements were otherwise satisfied. Such a ruling, of course, would render altogether meaningless a congressional enactment permitting suit to be brought in the bank's home county. This we are unwilling to do. *Langdeau, supra,* at 559-60.

II. The Decision of the Superior Court Widens the Breach Between State and Federal Decisions on Whether Section 94 Can Be Waived; the Court Shoud Resolve These Differences in Accordance With Its Previous Precedents.

The decision in the Court below fuels up the conflict between the state and federal judiciaries on the question of whether the immunity conferred by Section 94 can be waived by conduct alleged to be inconsistent with the assertion of the statute. A review of the more than one hundred opinions interpreting this section reveals a discernible and growing trend on the part of the states to resist the application of this section to national banks which are in some fashion "present" within their respective jurisdictions.[6] Regularly, the state courts are able to perceive some activity on the part of a national bank which is inconsistent with the retention of the venue privilege. Two such decisions, relied upon by the Court below, are *Okeechobee County v. Florida National Bank,* 112 Fla. 309, 150 So. 124 (1933) where a national bank was sued as a party to a trust agreement which it had entered in a foreign jurisdiction, as a result of which the Florida Court found a waiver of the bank's timely assertion of the privilege. *Lichtenfels v. North Carolina National Bank,* 260 N. C. 146, 132 S. E. 2d 360 (1963) saw the North Carolina Supreme Court prevent a national bank from transferring litigation in which it was involved as a testamentary trustee to the Court having jurisdiction over the place where it was established (212 Pa. Super. at 191, 240 A. 2d at 93, 94).

6. This Court has observed this dichotomy in the Langdeau case where it classified cases according to how section 94 was applied. The federal courts were uniform in enforcing the statute, whereas the state cases varied in the degree to which they made the statute effective.

More recently, *Schaefer Sons, Inc. v. Watson*, 272 N. Y. S. 2d 780 (1966) remanded a case to the trial court for determination of whether a national bank's activities in the forum county through a branch, manifested an intent to conduct business as a member of the business community in the forum. The clear import of the remand was that if the trial court found that the national bank was doing business, it would hold that a waiver occurred. Many other state courts have taken a similar approach.[7]

On the other hand, federal decisions have uniformly applied the venue statute when a national bank has raised it at the appropriate time. Since the *Langdeau* and the *Robertson* cases, federal courts have unfailingly rendered this statute fully effective, not only when confronted with conflicting state statutes, but in the face of contrary federal law. In *General Electric Credit Corp. v. James Talcott, Inc.*, 271 F. Supp. 699 (S. D. N. Y., 1966), the district court struggled to reconcile the venue provisions of the Securities Acts with the National Bank Act. There, the bank's executive offices and three branches were located in the Southern District of New York, whereas the bank's charter recited that it was established in the Eastern District of New York, making venue in that district proper. The venue provisions of the securities legislation (15 U. S. C. § 77v and 15 U. S. C. § 78aa) would lay venue where the national bank is found or is an inhabitant or transacts business. Certainly, the national bank in *Talcott* was transacting business in the same sense that Petitioner is doing business through its branch in the instant case. Nonetheless, the Court was impressed by the position taken

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7. See also, Continental National Bank v. Folsom, 78 Ga. 449, 3 S. E. 269 (1863); Lee v. Citizens National Bank, 13 Ohio Dec. Reprint 913 (1872); Solum v. Farmers & Merchants National Bank, 269 Minn. 431, 131 N. W. 2d 231 (1964) and cases collected at 1 ALR 2d 904 (1965).

by this Court in *Langdeau* and ruled that Section 94 was to be applied, placing revenue in the Eastern District.

Dealing more recently with the same conflict in venue statutes, the Second Circuit affirmed the *Talcott* approach stating:

> The Supreme Court has emphatically held that where Congress has dealt with a particular venue problem—here actions against national banks—broader language in a venue statute will not overcome this even though literally applicable. *Bruns, Nordeman & Co. v. American National Bank & Trust Company,* 394, F. 2d 300, 303 (2d Cir. 1968).

The dichotomy between the federal system, faithful to the mandate of the statute, and the state-created variations on a waiver theme, has resulted in an arbitrary and discriminatory application of the statute. Presently, the application of section 94 depends upon the Court in which a national bank finds itself named as a party. Petitioner urges this Court to terminate this conflict with a strong declaration requiring absolute fidelity to the National Bank Act and to this Court's previous mandates.

The Pennsylvania Court is powerless to deny the immunity granted to Petitioner by Congress in section 94. The Court has decided a federal question of substance by inventing a general "doing business" exception to the statute, a fabrication never contemplated by Congress and at odds with the thinking of this Court.

CONCLUSION.

For the reasons set forth above, we respectfully submit that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: September 5, 1968

APPENDIX A.

COURT OF COMMON PLEAS NO. 5.
SEPTEMBER TERM, 1966

No. 4567

DONALD T. LAPINSOHN
AND
CAROL LAPINSOHN, HIS WIFE
v.
LEWIS CHARLES, INC.
(a New Jersey Corporation),
Defendant
AND
FIRST CAMDEN NATIONAL BANK
AND TRUST CO.,
Garnishee

OPINION.

GOLD, P. J.

Plaintiffs, residents of New Jersey, commenced this action by a writ of foreign attachment directed against funds of defendant, also a resident of New Jersey, on deposit with First Camden National Bank & Trust Company at their branch office in Philadelphia. The underlying transaction involved a contract for the sale of real estate located in New Jersey which was allegedly breached by defendant

in that it failed to satisfactorily repair the premises following plaintiffs' complaints of faulty construction. Both defendant and garnishee have filed preliminary objections to the attachment questioning the jurisdiction of the Court.

Defendant's objections are easily disposed of. Their basis is that Pennsylvania Rules of Civil Procedure 1251-79, relating to foreign attachment, were not designed for use by non-resident plaintiffs against non-resident defendants. Defendant frankly admits that the existing case law, e.g., *Fairchild Engine & Airplane Corp. v. Bellanca Corp.*, 391 Pa. 177 (1958) is directly opposed to this proposition. What defendant is asking us to do is overrule established precedent. This is beyond our power. A common pleas court is not at liberty to ignore a pronouncement of the appellate courts and defendant's only recourse is to convince our Supreme Court of the correctness of its position.

Garnishee's preliminary objections present a more serious question. They rely solely on the venue section of the National Banking Act, 12 U. S. C. Sec. 94, which provides as follows:

> "Actions and proceedings against any association under this chapter may be had in any district in which such association may be established or in any State, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

It should be noted at the outset that the above provisions are construed as mandatory rather than permissive, *Mercantile National Bank v. Langdeau*, 371 U. S. 555 (1962), and also that a national bank is "established" or "located" only in the state where its principal office is situated. *Cope v. Anderson*, 331 U. S. 461 (1947). In the present case, First Camden's principal office is located in Camden, New Jersey.

Garnishee's position is that plaintiffs cannot subject the bank to process issued out of a state other than the one in which its home office is maintained. Plaintiffs respond that where a national bank is summoned as garnishee, the action is not "against" the bank and therefore the National Banking Act does not apply.

The original purpose of the venue rule was for the convenience of the banking institution and to prevent interruptions in their business as a result of their books being sent out in obedience to process from state courts. *Charlotte National Bank v. Morgan*, 132 U. S. 141 (1889).

Thus, the issue becomes whether this purpose is equally frustrated whether the bank appears in the action as garnishee or defendant.

The duties of a garnishee are outlined in Rules 1251-79 of the Pennsylvania Rules of Civil Procedure. It will be seen that a garnishee must file a report with the Prothonotary's Office within 20 days from service of the writ setting forth in detail all property of defendant in his possession (Rule 1266). The report must mention which of the property is immune or exempt. If a garnishee fails to file the report within the time specified, Rule 1266(b) provides that the Court shall order the garnishee to appear to be examined orally under oath with respect to the information required, which order the Court can enforce by attachment of the person of garnishee. Rule 1274 states that after judgment is entered against the defendant, the garnishee is required to answer interrogatories within 20 days supplying such information as names and addresses of persons taking part in any transaction, the specific amount of any debt, the value and location of any property and the nature and amount of consideration given for any transfer of property. Rule 1275 is particularly valuable in terms of shedding light on the nature of the garnishee's

relationship to the suit. It provides that the procedure between plaintiff and garnishee shall, as far as practicable, be the same as though the interrogatories were a complaint and the answer of the garnishee were an answer in assumpsit. Finally, Rule 1276 significantly makes the garnishee subject to judgment in the same amount as the defendant in the event of his failure to file a report.

It should be apparent from the above that the duties of a garnishee are comparable to those of a defendant in many ways, and that both are subject to the same ultimate sanction—that of a judgment being entered against them. Thus, should its objections be dismissed, First Camden will be required to file detailed reports and answers to interrogatories or appear personally and be faced with the possibility of having judgment entered against it, all in a state court in which they could not lawfully have been made a defendant in the first place.

In view of the above, we hold that the reason for the rule allowing national banks to be sued only where their principal office is located is equally applicable whether the bank is made defendant or garnishee.

Plaintiffs' additional argument is that the bank has waived the benefits of the Act by its substantial contacts with Philadelphia. We do not agree. The mere fact that First Camden interposed these preliminary objections indicates strong resistance and not waiver. In any event, we are not persuaded that any amount of contacts can affect the mandatory provisions of the Act.

Our research reveals that this is a case of first impression not only in the State of Pennsylvania but also in the entire United States. To borrow a phrase from Longfellow, we feel that we have shot an arrow in the air and that we know where it will land. We think that good law and a pragmatic view dictates the result we have reached. It

is rare in law that such a synthesis takes place. The National Bank Act was enacted many years prior to the promulgation of discovery rules. The defendant here has its principal office in Camden, New Jersey. Were the rule otherwise it could be subject to process issued from several contiguous states and it does not strain our imagination to visualize that the officers of the bank could be subject to discovery proceedings in each of the contiguous states at the same time. It is this direful prospect that the National Bank Act was designed to avoid.

Accordingly, the defendant's preliminary objections are dismissed. The garnishee's preliminary objections are sustained and the complaint is dismissed as to it.

By THE COURT:

/s/ JOSEPH E. GOLD, *P. J.*

DATED: February, 1968.

APPENDIX B.

IN THE
SUPERIOR COURT OF PENNSYLVANIA.

No. 684, October Term, 1967.

DONALD T. LAPINSOHN AND
CAROL LAPINSOHN, h/w.,

v.

LEWIS CHARLES, INC.
AND
FIRST CAMDEN NATIONAL BANK AND TRUST CO.
AND
COMMONWEALTH LAND TITLE INSURANCE CO.

Appeal From the Order of the Court of Common Pleas No. 5 of Philadelphia County at No. 4567, September Term, 1966. (heard in C. P. No. 6).

OPINION BY HOFFMAN, J.

Filed: March 21, 1968.

Lewis Charles, Inc. [Charles] entered into an agreement in Philadelphia on October 20, 1965, wherein it agreed to construct a house in Cherry Hill, New Jersey for Donald T. Lapinsohn and Carol Lapinsohn, appellants. On April 27, 1966, appellants and Charles entered a supplemental agreement, in Philadelphia, containing certain warranties and guarantees concerning the construction of this new home. In reliance on these agreements, settlement was made in Philadelphia at that time.

Soon thereafter, appellants noted evidence of improper construction. To secure relief, appellants instituted suit by foreign attachment seeking to attach Charles' assets in the hands of the First Camden National Bank and Trust Company [Bank], appellee. This Bank is a federally-chartered bank with its principal office in Camden, New Jersey. The Bank also operates a branch bank at 223-225 Market Street, Philadelphia, Pennsylvania. The writ was served on the Bank at its Philadelphia office on November 25, 1966.

The Bank filed preliminary objections on December 5, 1966, alleging that it was immune from suit in Pennsylvania under 12 U. S. C. § 94, a federal venue statute which limits actions against national banks.

On December 16, 1966, appellants filed an Answer and New Matter to the Bank's preliminary objections, alleging *inter alia*, that the Bank, by its conduct, had waived its right to object to such attachment.

On March 21, 1967, depositions were taken of a vice-president of the Bank, and an assistant vice-president who was the manager of the Philadelphia office.

The matter was then heard before the lower court on these preliminary objections and depositions. The court entered an order on May 29, 1967, sustaining the Bank's objections and dismissing appellant's complaint in assumpsit on the basis that the Bank could not be made a garnishee in Pennsylvania. This appeal followed.

The sole question raised by this appeal is whether the assets of a depositor in this Bank, which operates a branch bank and office in Philadelphia, may be garnished in Philadelphia when the Bank's principal office and place of incorporation are in Camden, New Jersey.

Section 94 of 12 U. S. C. provides: "Actions and proceedings against any association under this chapter may be had in any district or Teritorial court of the United

States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

The fundamental purpose underlying this venue statute is to protect a federally-chartered bank from being sued in a district or county other than that in which it was originally established and chartered. *Michigan National Bank v. Robertson*, 372 U. S. 591, 83 S. Ct. 914, 9 L. Ed. 2d 961 (1963); *Mercantile National Bank v. Langdeau*, 371 U. S. 555, 83 S. Ct. 520, 9 L. Ed. 2d 523 (1963); *Buffum v. Chase National Bank*, 192 F. 2d 58, (7th Cir. 1951), cert. denied, 342 U. S. 944, 72 S. Ct. 558, 96 L. Ed. 702 (1952); *Schaefer Sons, Inc. v. Watson*, 272 N. Y. S. 2d 790, 26 A. D. 2d 659 (1966); *Raiola v. Los Angeles First National Trust & Savings Bank*, 233 N. Y. S. 301, 133 Misc. Rep. 630 (1929). Although the word "established" is used with reference to venue in the federal courts and the word "located" with regard to venue in state courts, our extensive research reveals that both words have been interpreted to mean the place specified in the organizational certificate.[1] *Schaefer Sons, Inc. v. Watson*, supra.

"As originally conceived under the [National Bank] Act, national banks were not allowed to establish branches. Although the National Bank Act was amended in 1865 to allow state banks already maintaining legally established branches with certain amounts of capital assigned to them to retain their branches and become national banks, it was not intended at that time to permit national banks generally to establish branches." "An Assault on the Venue Sanc-

1. The Articles of Association of the First Camden National Bank state that: "The main office shall be in Camden, Camden County, New Jersey. The general business of the Association shall be conducted at its main office and its legally established branches."

tuary of National Banks," 34 Geo. Wash. L. R. 765, 768 (1966) [cited hereinafter as 34 Geo. Wash. L. R.]

Since national banks could not establish branches, and since they conducted very little business outside of the general area of their office, it was not unreasonable to restrict suits to the site where that business was conducted. Moreover, the venue statute here involved was passed shortly after the Second National Bank Act, at a time when national banks were in great need of protection from suit. Thus, the purpose of the Act was to protect and afford convenience to the national banks, "and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts." *First National Bank of Charlotte v. Morgan*, 132 U. S. 141, 145, 10 S. Ct. 38 (1889); see *Chaffee v. Glens Falls National Bank & Trust Co.*, 123 N. Y. S. 2d 635, 204 Misc. 181, affirmed 128 N. Y. S. 2d 539, 223 A. D. 694, appeal denied 129 N. Y. S. 2d 237, 283 A. D. 2d 793 (1953).

In 1927, Congress amended the National Bank Act to permit a national bank, under certain conditions, to effectively compete with state banks by setting up branch banks.[2] Section 81 of the Act was also amended in 1927 to read: "The general business of each national banking association shall be transacted in the place specified in its organization certificate *and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.*" [Emphasis indicates amended portion of the statute.] Thus, for the first time, Congress foresaw that national banks might conduct business outside of the county or district of the principal office.[3] Yet, the venue provision, enacted in 1864, remained unchanged.

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2. See 12 U. S. C. § 36, as amended.

3. See U. S. Cong. Rec. 9890-98 (1932).

We note that some courts have disregarded this historical background and rigidly fulfilled the literal language of § 94 by permitting suit only at the bank's principal office or location. For example, in 1936, the U. S. Court of Appeals for the Second Circuit affirmed the old concept of "location" as limited to the place specified in the organization certificate. *Leonardi v. Chase National Bank,* 81 F. 2d 19 (2d Cir. 1936), cert. denied, 298 U. S. 677 (1936);[4] see 34 Geo. Wash. L. R., supra at 769-770. In most of the suits arising under this provision, however, the bank did not have a branch in a second district or county, but was merely conducting business through an agent or was involved in isolated transactions, *e.g., Michigan National Bank v. Robertson,* supra.[5]

In an effort to ameliorate the harsh results of a strict interpretation of § 94, several courts found national banks subject to suit on a theory of waiver. "It is well settled that the exemption granted to national banks under § 94 is a personal privilege and may be waived by the bank either by failure to assert it or by conduct inconsistent with its re-

4. In *Leonardi,* the Bank's principal office was in the Southern District of New York, but the bank also had a branch in the Eastern District of New York, upon which the summons was served. The Second Circuit held that, even in light of the amendments to the National Bank Act, the proper place for suit was still where the principal office was located. To support this proposition, the Court relied on *National City Bank v. Domenech,* 71 F. 2d 13 (1st Cir. 1934), wherein it was held that a New York bank with a branch bank in Puerto Rico was "located" in New York for purposes of taxation. That a bank may be taxed in only one place in no way supports the proposition that a bank physically located in another district, cannot be subject to suit. Moreover, such a construction disregards the amendments and legislative history which permitted a national bank to conduct business in more than one location.

5. There are relatively few banks having branches in two states because they are now apparently prohibited by 12 U. S. C. 36(c). The branch involved in the instant case was permitted by a grandfather clause in the banking code.

tention." 34 Geo. Wash. L. R. supra at 774, see *First National Bank v. Morgan*, supra.

In several cases involving conduct by banks outside of the district in which they were established some courts, as previously noted, have held that suit could not be brought in such foreign districts. Branch banks, however, were not involved in most of those cases. For example, in *Buffum v. Chase National Bank*, supra, a New York bank conducted business in Illinois with regard to trust accounts. It had registered as a foreign corporation to specifically transact this business. A contract suit, arising out of business wholly unrelated to its trust transactions, was filed against the bank in Illinois. The U. S. Court of Appeals for the Seventh Circuit held that the bank had only consented to be sued on transactions arising out of the limited trust business and had ". . . evinced no intention to waive in its entirety the privilege it had under the laws of being sued only in New York." at 61. Nevertheless, the Court cautioned that the privilege accorded national banks could impliedly be waived by conduct "inconsistent with an assertion of retention of the right." See also *Sulil Realty Corp. v. Rye Motors, Inc.*, 257 N. Y. S. 2d 111, 45 Misc. 2d 458, affirmed 262 N. Y. S. 2d 989, 47 Misc. 2d 715 (1965).

On the other hand, several state courts have specifically found a waiver of the right to assert the protective venue statute where a national bank has transacted business in a foreign jurisdiction, even though no branch bank was set up. In *Okeechobee County v. Florida National Bank*, 112 Fla. 309, 150 S. 124 (1933), the defendant bank was liable under a tripartite agreement for any breach of a trust agreement in a foreign jurisdiction. The Court held that when a national bank had specifically entered into such an agreement in a district or county other than its charter location, it had thereby waived its right to assert the venue

statute by a preliminary objection. Recently, in *Lichtenfels v. North Carolina National Bank*, 260 N. C. 146, 132 S. E. 2d 360, 1 A. L. R. 3d 897 (1963), the Supreme Court of North Carolina was faced with a similar problem. There, the bank acted as a testamentary trustee and was sued for mismanagement of the trust in a county other than the one in which it was established. The bank moved preliminarily to transfer the action to the county of its establishment. The Supreme Court of North Carolina reversed a lower court's grant of the motion and stated, "undoubtedly they [the bank] sought and accepted the grant of authority conferred on them by the Superior Court of Buncombe County for pecuniary reasons." The Court reasoned that when a bank intentionally conducts business beyond its principal office, it waives any venue protection, just as a person may waive venue requirements in diversity suits.[6] *Neirko Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167 (1939).

The Supreme Court of the United States has also recognized the concept of waiver. See *First National Bank of Charlotte v. Morgan*, supra. In the recent case of *Michigan National Bank v. Robertson*, supra, Justice BLACK, in a concurring opinion, stated that a national bank can certainly waive its venue privilege, and thus, it can be sued in any state where it has done business related to the cause of action.

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6. In *Schaefer Sons, Inc. v. Watson*, supra, the Appellate Division in New York remanded the record in the case for determinations as to the bank's activities in the county wherein venue was sought to be placed. That case stated that the important elements to take into consideration are the bank's financial activity in the county, and if a branch is involved, any evidence that indicates an intent to conduct business as part of the community. The majority held that only by making such findings could the Court decide if the bank had waived its protection under the venue statute. The dissent concluded that the bank should be subject to service at a branch bank whenever it is physically located in another county or district.

In view of the fact that national banks have set up branches or conduct business in outlying counties or other states, recent decisions have stated that the sanctuary created by the venue statute cannot be absolute. See *Buffum v. Chase National Bank*, supra; 34 Geo. Wash. L. R. 765, supra.[7] The most logical reason for this approach is well-stated in *Chaffee v. Glens Falls National Bank & Trust Co.*, supra. There the Court stated "The inconvenience and the interruptions of banking business thus discussed in 1889 have today been mitigated, if not, in fact, minimized, by present modes of rapid transportation and communication and by mechanical and electronic accounting systems and photostatic and microfilming processes, among others, and the present pre-trial practice and liberalization of the rules respecting documentary evidence have further eased the burden incident to litigation in which banks may be involved. Thus the supposed objective of the statute has been in large part attained through other means. ". . . To hold that while any bank may quite properly seek loans, trust estates and other business in all parts of the state, those with whom that business is done can sue only in the county of the bank's domicile, seems an unnecessarily harsh determination."

We believe this approach to be realistic. If a national bank avails itself of a jurisdiction by setting up a branch to conduct general banking business, it has manifested an intent to be found in that jurisdiction for purposes of suits arising out of any business conducted there. It is to be remembered that the original purpose of the venue restrictions was to limit suits to where most of the records were

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7. One recent article in reviewing the decisions under 12 U. S. C. § 94, stated this: ". . . [I]f the national bank has a branch established for conducting general business in the jurisdiction, the bank is doing sufficient business in that jurisdiction to constitute waiver of section 94." 34 Geo. Wash. L. R. at 777.

kept and business conducted. But, if a branch can be established to conduct business, there is no logical reason to rigidly apply a statute when doing so actually subverts its purpose.

The instant case is an apt example of where, although suit may be brought at the branch bank, the general policies of the National Banking Act are preserved. The Bank has, since, 1928, through a merger, owned and operated a branch bank in Philadelphia. It is a single story bank building which employs six persons, including an assistant vice-president and three tellers. The Philadelphia branch offers a full range of banking services at this office, which are generally the same as those offered by the Bank at its main office or other branches in New Jersey.[8] In other words, it is a "full-service bank."

In addition, the Philadelphia branch considers itself a competitor of, and in direct competition with other banks in Philadelphia, and actively solicits Philadelphia customers. The branch also pays real estate taxes on its Philadelphia property, pays Pennsylvania use tax on property brought in this state, and pays and withholds Philadelphia wage tax on its employees working in Philadelphia.

It is also important to note that deposits in any office of the Bank can be withdrawn at any other office, no matter where the records are kept. All records of savings fund deposits made in the branch are kept at the Philadelphia office. On checking accounts, the Philadelphia office receives up to date records of each account every morning via computers in Camden in order to effectuate this liberal withdrawal service. The vice-president testified that if any

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8. Some of the services offered are safe deposit boxes, savings accounts, Christmas and vacation clubs, collateral and personal loans, bank by mail services and payroll make-up. In addition, if a customer comes into the Philadelphia office for services not rendered directly in that office, the branch bank will transport him over to Camden to secure these services.

account is attached by service on the New Jersey office, such attachment in New Jersey also attaches the account in its Philadelphia office. Thus, the present methods of record keeping utilized by the Bank obviates the primary purpose of the venue statute and, as the depositions clearly indicate, places no burden upon either the branch office or the charter office in Camden.

The instant attachment arises out of the fact that the Bank operates a branch bank in Philadelphia. To the extent that Charles' funds are made available to it in Philadelphia by the Bank, they are attachable by service of a writ on the Bank. In normal garnishment and attachment actions, the plaintiff, who secures a judgment against a defendant, becomes the debtor with regard to money originally owed to the defendant. Here, had the Bank maintained only an office which offered loan or mortgage services, it could be argued that its Philadelphia operations were not related to appellant's attachment. See *Buffum v. Chase National Bank*, supra. The basis of the present attachment, however, is the very fact that the Bank's Philadelphia operations make the attached funds, a debt owing to Charles, available to Charles in Philadelphia. See *Schaefer Sons, Inc. v. Watson*, supra. Hence, the Bank is quite inextricably tied to one of the parties in the underlying assumpsit suit, and, therefore, fused into the matrix of this action.

For the above reasons, we find that the Bank has waived its right to assert the protective provisions of 12 U. S. C. § 94. The Order of the lower court sustaining the Bank's preliminary objection is, therefore, reversed, and appellants' writ of foreign attachment and complaint in assumpsit are reinstated.

MONTGOMERY and WATKINS, *J.J.*, dissent.

APPENDIX C.

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT.

MISCELLANEOUS DOCKET 16.

No. 179.

DONALD T. LAPINSOHN AND
CAROL LAPINSOHN, H/W

v.

LEWIS CHARLES, INC.

AND

FIRST CAMDEN NATIONAL BANK AND
TRUST CO.

AND

COMMONWEALTH LAND TITLE
INSURANCE CO.

ORDER.

June 10, 1968.

Petition Denied.

PER CURIAM.

APPENDIX D.

Excerpts From the Pennsylvania Rules of Civil Procedure Relating to Foreign Attachment Practice.

Rule 1252. *Scope.*

A foreign attachment may be issued to attach property of a defendant not exempt from execution, upon any cause of action at law or in equity, other than an action ex delicto arising from acts committed outside the Commonwealth, in which the relief sought includes a judgment or decree for the payment of money when

(1) the defendant is an individual who is a non-resident of the Commonwealth, even though he is present in the Commonwealth;

(2) the defendant is a partnership or an unincorporated association without a regular place of business in the Commonwealth and the action is against the defendant in its firm or association name, even though one or more members of the partnership or association are present in or are residents of the Commonwealth;

(3) the defendant is a foreign corporation or similar entity which is not registered in the Commonwealth.

Rule 1253. *Garnishee.*

Any person may be made a garnishee and shall be deemed to have possession of property of the defendant if he

(1) owes a debt to the defendant;

(2) has property of the defendant in his custody, possession or control;

(3) holds as fiduciary property in which the defendant has an interest; or

(4) holds the legal title to property of the defendant, whether or not in fraud of creditors.

Rule 1254. *Venue.*

(a) An attachment against personal property of the defendant may be issued in and only in a county in which

(1) the property is located, or

(2) a garnishee may be served.

(b) An attachment against real property of the defendant may be issued in and only in a county in which all or any part of the property is located. . . .

Rule 1257. *Service of Writ Upon Garnishee or Person in Possession.*

The sheriff shall serve the writ in the same manner as a writ of summons in assumpsit upon the named garnishee and upon any person not named as garnishee who is found in possession of property of the defendant, and shall furnish the person served with an additional copy of the writ for each defendant. . . .

Rule 1266. *Garnishee's Report. Examination of Garnishee.*

(a) Within twenty (20) days after service of the writ upon him, a garnishee shall file in the office of the prothonotary a report under oath setting forth in detail all property of the defendant in his possession. If any property attached is immune or exempt from attachment, the report shall so state.

(b) If a garnishee fails to file the report within the time specified, the court on motion shall order the garnishee

to appear to be examined orally under oath with respect to the information required. The court may enforce its order by attachment of his person.

Rule 1267. *Notice by Garnishee.*

(a) Upon being served with the writ, the garnishee shall promptly forward a copy to the defendant.

(b) Upon being served with the complaint, the garnishee shall promptly forward a copy to any defendant who has not been served, appeared or filed a bond.

(c) Upon filing his report, the garnishee shall promptly forward a copy to the defendant.

(d) A copy is forwarded within the requirement of this rule when it is delivered to the defendant by a competent adult at any place within or outside the Commonwealth in the manner prescribed for the service of a writ of summons in an action of assumpsit or when it is mailed to the defendant by registered mail directed to his last known address.

Rule 1268. *Garnishee. Duty to Defend. Preliminary Objections to Attachment.*

(a) If the garnishee forwards copies to the defendant as provided in Rule 1267, he shall be under no duty to resist the attachment or defend the action in any manner but may, prior to judgment against the defendant, resist the attachment by preliminary objections.

(b) The defense of immunity or exemption of the property from attachment and the defense that no property of the defendant was in the possession of the garnishee at the time of service of the attachment may be pleaded by the garnishee by preliminary objection but are not waived if not so pleaded. . . .

Rule 1271. ***Defenses. Immunity or Exemption. No Property Attached.***

The defense of immunity or exemption of property from attachment and the defense that no property of the defendant was in the possession of the garnishee at the time of service of the attachment, may be raised by the defendant without thereby subjecting himself to the jurisdiction of the court

(1) by preliminary objection under Rule 1017(b)(1), or

(2) by a petition to open judgment, filed at any time before the garnishee files his answer to interrogatories. . . .

APPENDIX E.

Title 17 *Pa. Stat. Ann.* § 190, subtitled: "Appeal to supreme court from superior court" reads as follows:

> Nevertheless in any action or proceeding whatever above committed to the final and exclusive decision of the said court, there may still be an appeal from its judgment or order to the Supreme Court, if an appeal to the Supreme Court be specially allowed by the Superior Court itself or by any one justice of the Supreme Court. As amended 1963, Aug. 14, P. L. 819 § 1.

SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
OCT 1 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 481

FIRST CAMDEN NATIONAL BANK & TRUST CO.,
Petitioner,

v.

DONALD T. LAPINSOHN and
CAROL LAPINSOHN, his wife,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, Donald T. Lapinsohn and Carol Lapinsohn, his wife, oppose the petition for a writ of certiorari to the Superior Court of Pennsylvania heretofore filed by the First Camden National Bank and Trust Company, and state below the grounds and reasons for their opposition.

QUESTION PRESENTED

Did not the Superior Court of Pennsylvania correctly hold that the funds of a company on deposit in a national

bank chartered in Camden, New Jersey, may be garnished at the Bank's full service branch bank in Philadelphia, Pennsylvania, where the Bank permits the depositor to withdraw its funds at the Bank's Philadelphia or New Jersey branches interchangeably?

STATEMENT OF THE CASE

Donald and Carol Lapinsohn, respondents herein, entered into an agreement in Philadelphia, Pennsylvania, with Lewis Charles, Inc. (hereinafter called Charles) on October 20, 1965. Under this contract, Charles agreed to construct a home in Cherry Hill, New Jersey for respondents. On April 27, 1966, respondents and Charles entered into a supplemental agreement, also in Philadelphia, containing certain warranties and guarantees concerning the construction of this new home. In reliance upon these agreements, settlement was made in Philadelphia and respondents who were Philadelphia residents at this time moved from their home in Philadelphia to their new home in Cherry Hill, New Jersey.

Soon after, respondents noted evidence of grossly improper construction of their home. Unable to secure relief amicably, they instituted an action for damages against Charles in the Common Pleas Court of Philadelphia, Pennsylvania, by means of a writ of foreign attachment seeking to attach Charles' bank account on deposit with petitioner bank (R. 4a).

Petitioner is a national bank, chartered in Camden, New Jersey, with branch banks in New Jersey and in Philadelphia, Pennsylvania. The Bank's Philadelphia branch is a full service bank containing a full range of banking services (R. 32a-33a, 44a-55a). Under the Bank's own rules, a depositor can withdraw its funds at any of the Bank's branches, whether in New Jersey or Pennsylvania, irrespective of in which branch it makes its deposit (R. 27a, 34a).

Located at the Philadelphia branch at the time of the attachment[1] (and by virtue of the Bank's rules, also at all other branches of the Bank) was $9,500 on deposit by Charles, the full amount of respondents' claim at that time.

Under *Pennsylvania Rule of Civil Procedure*, 1253[2], the Bank was made a garnishee since it owed a debt to Charles and had property of Charles, (to wit, Charles' deposit) in its custody, possession and control. The writ was duly served on garnishee at its Philadelphia branch by virtue of Rule 1257, on November 25, 1966.

Venue was secured in Philadelphia under Rule 1254 on the grounds, as shown above, that Charles' bank account was located, *inter alia*, in Philadelphia County,[3] and the garnishee was served in Philadelphia County.

The Bank thereupon filed preliminary objections to the writ alleging that it was immune from suit in Pennsylvania under the venue requirements of 12 *U. S. C.* §94. At the same time Charles filed its own Preliminary Objections raising the plea of forum non-conveniens. Charles' objections were dismissed by the Common Pleas Court (R. 62a) and Charles did not appeal from this decision.

On December 16, 1966, respondents filed their answer and new matter to the petitioner's preliminary objections alleging, *inter alia*, that the Bank, by its conduct, had consented to being made a garnishee in Pennsylvania, and denying that the instant attachment was an action or pro-

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[1] Petitioner admits that absent the attachment, Charles could have withdrawn this amount at the Philadelphia branch (R. 34 a) and there was at this branch sufficient funds to pay Charles this amount (R. 34 a).

[2] All Pennsylvania Rules cited herein are set forth at length in petitioner's petition, (pp. 17a-20a).

[3] It should be noted that the bank has always recognized that when it is made a garnishee by an action initiated in New Jersey, that attachment is binding in prohibiting its depositors from withdrawing those funds in Pennsylvania as well as in New Jersey (R. 55a, 36a).

ceeding against the bank subject to the provisions of 12 *U. S. C.* §94 (R. 19a-21a).

On March 21, 1967, depositions were taken in Philadelphia of two officers of the Bank (R. 23a et seq.). On May 29, 1967, the Court of Common Pleas of Philadelphia sustained petitioner's preliminary objections and dissolved the writ. However, on June 9, 1967, respondents appealed to the Superior Court of Pennsylvania which on March 21, 1967 filed its opinion and order reversing the Court below and reinstating respondents' writ. On March 29, 1968, petitioner filed a petition for reargument with the Superior Court which was denied on April 16, 1968. On May 6, 1968, petitioner filed with the Supreme Court of Pennsylvania, a petition for allowance of an appeal which was denied on June 10, 1968.

ARGUMENT

1. *12 U. S. C. §94 Does Not Apply to Actions Against a Third Party Naming a National Bank as Garnishee.*

At the outset, it is important to note that the petitioner bank is not a direct defendant in this case, but is merely a garnishee in an action between two private parties, respondents and Charles.

The venue prohibitions of Section 94 concern themselves solely with "actions and proceedings *against*" a national bank. We submit that an action against a third party commenced by a writ of foreign attachment is not an "action or proceeding *against*" a national bank named a garnishee in that matter. Foreign attachment is not an action, or a form of action, but merely an original writ; a form of process used to commence an action, not against a person, but against a res. *United Industrial Corp. v. Nuclear Corp. of America*, 237 F.S. 971 (D. C. Del. 1964); *Atkins v. Canadian SKF Co.*, 353 Pa. 312 (1946); *York Corp. v. Super Service Freight*, 74 York L. R. 89 (1960).

It "is nothing more than 'the equivalent of a summons for the commencement of a personal action'." *Plum v. Tampex*, 402 Pa. 616, 168 A. 2d 315; cert. den. 82 Ct. 46, 368 U. S. 826.

Therefore, the attachment was not an "action or proceeding against" the bank, but a form of process directed against the property of Charles, and not subject to 12 *U. S. C.* §94.

There apparently have been no reported cases directly on this question. However, in *Earle v. Conway*, 178 U. S. 449, 44 L. Ed. 1146 (1900), a plaintiff had secured a judgment against a private defendant, and had served a national bank as a garnishee. The bank resisted that attachment on the grounds that 12 *U. S. C.* §91 prohibits attachments *against* a national bank before final judgment in any suit. In this case your Honorable Court held, at p. 454:

> "Whatever may be said of the scope of Section 5242 [12 U. S. C. §91], an attachment sued out *against the bank as garnishee is not an attachment against the bank or its property, nor a suit against it* within the meaning of that section. *It is an attachment to reach the property or interests held by the bank for others.*" (Emphasis supplied.)

This decision, we respectfully submit, is equally applicable to the venue provisions of 12 *U. S. C.* §94, and is authority for the proposition that an action commenced against a third party by means of a writ of foreign attachment naming a national bank as a garnishee is not an "action or proceeding against" the bank and is therefore not within the contemplation of that statute.

In addition, in *Casey v. Adams*, 102 U. S. 66 (1880), your Honorable Court held that Section 94 does not apply to *in rem* actions. Since, under applicable Pennsylvania law, the writ is directed against the property of the defendant located in Pennsylvania, it is an *in rem* action with regard to this property.

Therefore, we respectfully submit, Section 94 does not apply to the matter *sub judice* where the national bank is merely a garnishee.[4] Consequently, it is unnecessary to consider those arguments presented by petitioner in its petition for a writ of certiorari, which arguments erroneously assume Section 94 does apply.

II. *Petitioner Has Waived 12 U. S. C. §94 and May Be Made a Garnishee in Pennsylvania by Virtue of Its Operating a Branch Bank in Pennsylvania.*

Petitioner's main thrust relies primarily on a proposition that is not the issue in this case. Petitioner attempts to present the decision of the Superior Court in this case as a conflict between a federal venue statute and a Pennsylvania "doing business" doctrine. Throughout its petition, petitioner not only raises this straw man, but continually unjustly attacks the motives of the Superior Court for not deciding the case as petitioner would like it decided.

We respectfully submit that the issue is not a conflict between these two doctrines, but solely a question of whether a national bank, *by its own actions, and its own rules*, can waive the venue statute which has been enacted for its own benefit.

Your Honorable Court has recognized the concept of waiver with regard to Section 94. See *First National Bank of Charlotte v. Morgan*, 132 U. S. 141 (1889). Also see Justice Black's concurring opinion in *Michigan National Bank v. Robertson*, 372 U. S. 591 (1963); *Buffern v. Chase National Bank of N. Y.*, 192 F. 2d 58 (C.C.A. 2), cert. den. 342 U. S. 944.

Petitioner voluntarily maintains and operates its full service branch bank in Philadelphia for the express purpose of competing with the local Pennsylvania banks in Philadelphia (212 Pa. Superior Ct. at 194, 240 A.2d at 95). By its own rules, it permits its depositors to deposit their funds

[4] Respondents presented these arguments to the Superior Court but they were not decided by that Court.

in Philadelphia and withdraw them in New Jersey, or visa versa, or in any combination thereof (212 Pa. Superior Ct. at 194, 240 A.2d at 95). Petitioner has admitted that an attachment in New Jersey naming the Bank as a garnishee has always been considered by it to attach a depositor's funds in New Jersey and Pennsylvania equally (R. 35a-36a). The Superior Court, given these facts, held that the right of the respondents to attach Charles' funds on deposit with the Bank is coextensive with the Bank's own rules permitting Charles to withdraw its funds from the Bank (212 Pa. Superior Ct. at 194; 240 A.2d at 95).

Petitioner is asking your Honorable Court to hold that it may enter into Philadelphia, compete equally and on a par against local Philadelphia banks, obtain the full protection of the Philadelphia ordinances and Pennsylvania Statutes, yet be shielded against being made a garnishee in Philadelphia even though its competitor banks are not afforded the same privilege.

To support its position, petitioner relies on *Merchantile National Bank v. Langdeau*, 371 U. S. 555 (1963). We respectfully submit that the *Langdeau* case is not applicable to the instant action for several reasons. In that case the Court was not dealing with a matter where the national bank had a branch office. That case did not concern itself with interstate banking, but merely intercounty banking, and the concurring opinion in *Michigan National Bank v. Robertson*, supra, makes a clear distinction between these two concepts. In addition, of course, the matter *sub judice* deals with a case where the bank is a garnishee, and not where it is a direct defendant, as it was in the *Langdeau* case.

We respectfully submit that petitioner has cited no cases concerning the effect of interstate branch banking on Section 94, the proposition decided by the Superior Court. This may be because there are so few national banks with inter-state branch banks. It may be because under the *National Banking Act* as it now exists, new interstate branch banking by national banks can not occur (212 Pa.

Superior Ct. at 190). For whatever reason, petitioner has failed to show any conflicts between the decision of the Superior Court and any applicable federal court decisions on the issue of inter-state branch banking, the sole issue before this Court.

We respectfully suggest that since a bank may waive Section 94, and since:[5]

> "if the national bank has a branch established for conducting general business, in the jurisdiction, the bank is doing sufficient business in that jurisdiction to constitute waiver of Section 94"

and since the petitioner's own rules clearly show a waiver of Section 94, the opinion of the Superior Court of Pennsylvania is correct, both in its law, and in its practical effect. For these reasons, we submit, no substantial question has been raised by the Bank which warrants review by your Honorable Court.

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 4, 1968.

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[5] *"An Assault on the Venus Sanctuary of National Banks"*: 34 Geo. Wash. L. R. 765, 777.